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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 889

ZIM ISRAEL NAVIGATION CO., LTD., as owner of Steamship *ISRAEL*,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent,

and Steamship *AMERICAN PRESS*.

(And Cross-Suit)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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OCTOBER TERM, 1964

No. .....

ZIM ISRAEL NAVIGATION CO., LTD., as owner of Steamship *Israel*,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent,

and Steamship *American Press*.

(And Cross-Suit)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Zim Israel Navigation Co., Ltd., as owner of the SS. *Israel*, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, in the above entitled actions, which affirmed, by a divided court, an interlocutory decree of the United States District Court, Southern District

of New York, adjudging that a collision on October 29, 1959 between SS. *Israel* and SS. *American Press* was due to mutual fault.

The opinion of the Court of Appeals is reported in 336 F. 2d 150. The opinion of the Trial Court is reported in 222 F. Supp. 947. The opinion of the Court of Appeals is appended. Attachment "A".

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed is dated and was entered August 19, 1964, and a petition for rehearing thereof, filed with leave of said Court, was denied on December 4, 1964.

Jurisdiction to review said judgment by certiorari is provided by 28 U. S. C. A. §§1254(1), 2101.

Questions Presented for Review.

1. In the interest of prevention of ship collisions and establishment of a guiding interpretation of the statutory Inland Navigation Rules governing the navigation of crossing vessels, should not the decision of this Court in *Postal S.S. Corp.* v. *El Isleo,* 308 U. S. 378 (1940), be firmly defined, which ruled that "[t]he so-called privileged vessel has no absolute right to maintain her course and speed regardless of the danger involved in that action" (p. 387).

2. Should not the mandate on a privileged vessel to maintain speed under the statutory Inland Navigation Rules be lifted when she blows the danger signal signifying under Pilot Rule 80.7(b) that she sees danger developing in a crossing situation?

Statutes and Rules Involved.

The pertinent statutory Inland Navigation Rules and the Pilot Rules involved are as follows:

Two Steam Vessels Crossing.

ART. 19. "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." 33 U. S. C. A. §204.

Course and Speed.

ART. 21. "Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed." 33 U. S. C. A. §206.

Crossing Ahead.

ART. 22. "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." 33 U. S. C. A. §207.

Steam Vessel Shall Slacken Speed or Stop.

ART. 23. "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." 33 U. S. C. A. §208.

General Prudential Rule.

ART. 27. "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." 33 U. S. C. A. §212.

"§80.03 *Signals.* 33 C. F. R. 80.03.

* * * * * *

"(3) One short blast of the whistle signifies intention to direct course to own starboard, except when

two steam vessels are approaching each other at right angles or obliquely, when it signifies intention of steam vessel, which is to starboard of the other to hold course and speed."

"§80.2 Cross Signals.

Steam vessels are forbidden to use what has become technically known among pilots as 'cross signals,' that is, answering one whistle with two, and answering two whistles with one." 33 C. F. R. 80.2.

"§80.7. *Vessels approaching each other at right angles or obliquely.* (a) When two steam vessels are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steam vessel is overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse."

"(b) If from any causes the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steam vessels shall be stopped and backed if necessary, until signals for passing with safety are made and understood." 33 C. F. R. 80.7 (a) and (b).

Statement of the Case.

On a clear night on the date stated the United States Lines freighter *American Press* was proceeding northward in New York harbor in the Main Channel which lies immediately westward of Governors Island.

The passenger vessel *Israel* was proceeding westward in the channel range north of Governors Island to enter the Main Channel and turn to her left seaward to the south.

It is undisputed (and so found) that these respective vessels were on crossing courses; that the freighter was the burdened vessel obliged to keep out of the way, and the *Israel* was the privileged vessel. The privileged *Israel* was required under Article 21 of the Inland Rules (above quoted) to maintain her course and speed, subject to subdivision (b) of Pilot Rule 80.7 (above quoted).

It is also undisputed that each vessel was displaying regulation lights. *Israel's* passenger accommodations were lighted and this white-hulled vessel had her stack flood-lit. She was taken to be a Zim outbound sea-going passenger vessel.

The freighter collided bow on with the exposed port side of the *Israel* just aft of the *Israel's* bridge, in the Main Channel northwest of Governors Island.

The Trial Court ruled that the freighter negligently collided with the *Israel* because the freighter neglected to keep out of the way as the burdened vessel, neglected to alter course to starboard in accordance with Pilot Rule 80.7(a), neglected timely or adequately to slacken her speed, and was deficient in lookout in failing to hear the *Israel's* whistle signals in excellent conditions of audibility.

The *Israel*, on her part, sighted the freighter on her port hand upbound in the channel, promptly sounded a signal one-blast and then repeated it on hearing no answering signal. The one-blast signal sounded by the *Israel* signified (Pilot Rule 80.03) that she intended to maintain course and speed to cross the freighter's bow.

The *Israel*, after seeing that the freighter was proceeding ahead without turning to starboard (as found by both Courts below) and then hearing no response to her signals,

sounded the danger signal and then put her engines full speed astern.

The *Israel* reversed her engines, as stated, only one minute (0823½) before the time (0824½) "the vessels were in dangerously close quarters" and "* * * the situation considering the size of the vessels was perilous." (Trial Court Opinion, Zim Israel Appendix, p. 28a, first paragraph).

Nevertheless, the Trial Court assessed fault against the *Israel* for changing speed as she did, considering that there was not such immediate danger as to warrant departure from the *Israel's* duty to maintain speed (Opinion, Zim Israel Appendix, pp. 17-19).

Still, the Trial Court should be regarded as having found *Israel* at fault for only a technical statutory violation which was not contributory because the Trial Court went on to say:

> "It is evident that *had* the *American Press* turned to starboard at the time she gave the signal, or shortly thereafter, *the collision would have been avoided, despite the Israel's change of speed.*" (Opinion, Appendix, p. 29a.) (Italics supplied.)

The Court of Appeals in its majority opinion did not modify the Trial Judge's findings, but nevertheless affirmed the finding of contributory fault on the part of the *Israel.*

But Judge Moore, dissenting, stated:

> "I cannot reconcile the decision of the Supreme Court in *El Isleo* and the law as stated, with the conclusion of the court below. To me the *American Press* upon the conceded facts and the applicable law was solely at fault. Hence, I would reverse."

The affirmance imports that a privileged vessel's navigation is slavishly bound to the maintenance of speed and

does not have the latitude sponsored by the letter and spirit of this Court's *El Isleo* decision. Cited, *supra,* Question 1, Page 2.

The decision of affirmance plainly requires of a big ship navigator a choice between "danger" and "imminent danger" too refined to be workable and meet this Court's admonition to avoid danger.

The *El Isleo* decision was also considered by the Court of Appeals in the Fourth Circuit in *United States* v. *SS. Soya Atlantic,* 330 F. 2d 732. That Court ruled that a privileged vessel must hold on until "the danger of collision is obvious and imminent" (pp. 738-9) and considered that this Court's *El Isleo* decision permitted a privileged vessel to reduce speed only where it was apparent that the burdened vessel (by signaling that she intended to cross the privileged vessel's bow) expressed an intent not to take avoiding action. While it is correct that that was the situation considered in the *El Isleo* decision, it is submitted that the basic principle of that decision is that a privileged vessel is licensed to depart from maintaining speed in a situation likely to be dangerous (*El Isleo* decision, *supra,* at p. 387) and when she blows the danger signal pursuant to 33 C. F. R. 80.7(b) *supra,* p. 4.

Reasons for Allowance of Writ.

It is important to lower Federal Courts sitting in admiralty, and to Government agencies concerned with the investigation of vessel collisions in crossing situations and with the licensing and disciplining of ships' officers, that the application of Pilot Rule 80.7(a) and (b), in conjunction with the statutory Inland Crossing Rules, be authoritatively settled, and that the governing principle espoused by this Court in the cited *El Isleo* decision be re-defined.

The decision sought to be reviewed binds a privileged vessel in a crossing situation to a blind obedience to the maintenance of speed despite likely danger between the vessels threatening the crossing; and it should be corrected in the general interest of prevention of ship collisions.

Respectfully submitted,

DAVID C. WOOD,
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HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
of Counsel.

Dated: February 5, 1965.
New York, N. Y.

Attachment A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1963

(Argued June 1, 1964 Decided August 19, 1964.)

Docket No. 28528 Cal. 464

ZIM ISRAEL NAVIGATION CO. LTD., as Owner of Steamship *Israel*,

Libelant-Appellant,

v.

UNITED STATES LINES COMPANY,

Respondent-Claimant-Appellee,

and Steamship *American Press*.

Docket No. 28529 Cal. 465

UNITED STATES LINES COMPANY as Owner of Steamship *American Press*,

Libelant-Appellant,

v.

ZIM ISRAEL NAVIGATION COMPANY,

Respondent-Claimant-Appellee,

and Steamship *Israel*.

Before:

MOORE, KAUFMAN and MARSHALL,

Circuit Judges.

Appeals from a decree of the United States District Court for the Southern District of New York, Weinfeld, J., finding the SS. *Israel* and the SS. *American Press* both to

blame for a collision between the two vessels on October 29, 1959.

Affirmed on the opinion below, 222 F. Supp. 947 (S. D. N. Y. 1963).

EUGENE F. GILLIGAN, of HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE, New York, N. Y., for Zim Israel Navigation Co., Ltd.

JOHN F. GERITY, of KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Richard H. Brown, Jr. and Arthur J. Blank, of counsel), for United States Lines Company.

PER CURIAM:

In these consolidated actions, the owners of the SS. *Israel* and the SS. *American Press* each contend that the other's vessel was solely responsible for a collision between the two ships which occurred in New York Harbor on a clear and calm October evening in 1959. In a comprehensive and painstaking opinion below, Judge Weinfeld concluded that both vessels were at fault. We believe that his findings of fact were not clearly erroneous and that his conclusions of law were correct. We affirm on his opinion, reported at 222 F. Supp. 947 (S. D. N. Y. 1963).

As Judge Weinfeld noted and as both parties concede, the *Israel* was the "privileged" vessel, and accordingly had the duty of maintaining her course and speed; the *American Press* was the "burdened" vessel, and was charged with the obligation of averting the *Israel's* path. On appeal, neither party seriously questions Judge Weinfeld's findings that both vessels failed to comply with their obligations. Each contends, however, that the other's derelictions were the true cause of the accident, that its own faults contributed to the collision in no respect, and that any deviations from the path of duty were necessitated by the wrongdoing of the other.

Identical contentions were rejected below, and on this record we would have no justification on appeal in reaching

a contrary conclusion as to these essentially factual questions so fully litigated in the court below. "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly eroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure." *McAllister* v. *United States,* 348 U. S. 19, 20 (1954); *Alison* v. *United States,* 251 F. 2d 74, 76 (2d Cir. 1958). See also *Morales* v. *City of Galveston,* 370 U. S. 165, 168 (1962).

The judgment is affirmed.

MOORE, Circuit Judge (dissenting):

This was an utterly needless collision and should not have occurred. But occur it did and it remains only to assess fault. The trial court has made careful and well-considered findings on the basis of which in my opinion the conclusion must be drawn as a matter of law that the *American Press* was solely to blame for the collision. No repetition of the facts amply set forth in the trial court's lucid analysis is necessary. See..... F. Supp.....

The *Israel* was the privileged vessel: the *American Press* the burdened vessel. Pilot Rule 80.7(a) provides that the burdened vessel "shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse."

In my opinion, the conclusions of the trial court are inconsistent with the finding that both vessels were at fault. He found that "[t]he essential duty of the *American Press* as the burdened vessel was to keep out of the way of the *Israel"; that the American Press* failed to alter her course to starboard; that had she done so the collision would have been avoided despite the *Israel's* change of speed; that starboard action was not precluded by an alleged shoal

area; and that the *American Press* failed in her statutory duty to keep out of the way of the *Israel*.

Despite these findings, the trial court found that the *Israel* committed a breach of statutory duty in that she failed to maintain her course and speed. However, "[t]he so-called privileged vessel has no absolute right to maintain her course and speed regardless of the danger involved in that action." *Postal S.S. Corp.* v. *El Isleo*, 308 U. S. 378, 387 (1940). It was the failure of the *American Press* to go astern of the *Israel* which was the cause of the collision. Even assuming a departure by the *Israel* from a statutory duty to maintain speed and course, the reduction in speed was not a producing cause of the *American Press's* failure to veer to starboard.

I cannot reconcile the decision of the Supreme Court in *El Isleo* and the law as stated, with the conclusion of the court below. To me the *American Press* upon the conceded facts and the applicable law was solely at fault. Hence, I would reverse.